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No. 07-1391

In The
SUPREME COURT OF THE UNITED STATES

ALVIN GEORGE VONNER

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 07-1391

ALVIN GEORGE VONNER, PETITIONER

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UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Respondent contends that the majority opinion of the en banc Sixth Circuit implicates no conflict with other courts of appeals and is consistent with the opinions of this Court. Brief Opp. 7-8. For the following reasons, respondent's arguments fail.

I. A SIGNIFICANT CONFLICT EXISTS AMONG THE COURTS OF APPEALS OVER WHETHER A DEFENDANT IN A CRIMINAL PROCEEDING MUST OBJECT TO THE PROCEDURAL UNREASONABLENESS OF A SENTENCE JUST PRONOUNCED IN ORDER TO PRESERVE REASONABLENESS REVIEW ON APPEAL.

It is clear that the Third, Fourth, and Seventh Circuits have rejected plain error review to the procedural component of appellate review for reasonableness when an objection to the sentence just pronounced was not made. *United States v. Grier*, 475 F.3d 556 (3d Cir. 2007) (en banc); *United States v. Watson*, 257 Fed.Appx. 556, 559 (3d Cir. 2007); *United States v. Baham*, 215 Fed.Appx. 258, 261-262 (4th Cir. 2007); *United States v. Cunningham*, 429 F.3d 673 (7th Cir. 2005). These decisions create a split with the First, Second, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits. *See* Brief Opp. 9-11 (collecting cases). Adding to the confusion, the D.C. Circuit's decisions internally conflict on the application of plain error to reasonableness review, yet both the D.C. Circuit and the Second Circuit have held that a district

court's failure to provide sufficient reasoning for the sentence amounts to plain error. *United States v. Bras*, 483 F.3d 103 (D.C. Cir. 2007); *In re Sealed Case*, 527 F.3d 188 (2008); *United States v. Hirliman*, 503 F.3d 212, 215 (2d Cir. 2007). Therefore, while the respondent inaccurately argues that the dissenters below misunderstood the circuit split, it is abundantly clear that "**the majority's decision to apply plain error-review to one aspect of Vonner's *Booker* reasonableness claim ... deepens a growing circuit split.**" *United States v. Vonner*, 516 F.3d 382, 409 (Moore, J., dissenting, joined by Martin, Daughtrey, Cole, and Clay, JJ) (emphasis added). Pet. App. 100.

> **In light of the strikingly different approaches adopted by the circuits, we can only hope that the Supreme Court chooses to resolve the issue of whether defendants must object after the district court has imposed a sentence to preserve some, any, or all, of their *Booker* reasonableness claims.**

Vonner, 516 F.3d at 410. Pet. App. 103.

The respondent maintains there is a distinction between plain error review for the

procedural component of reasonableness and substantive reasonableness, and implies that the only circuit which conflicts with the Sixth Circuit's application of plain error to procedural reasonableness is the Seventh Circuit in *United States v. Cunningham*, 429 F.3d 673 (7th Cir. 2005). The respondent characterizes Circuit Judge Posner's analysis in *Cunningham* as "cursory" and prior to the "explanation of the distinct procedural and substantive components of post-*Booker* appellate review" in *Gall v. United States*, 128 S.Ct. 586 (2007). Brief Opp. 11. All of these arguments are incorrect.

First, appellate review for reasonableness entails both a procedural and a substantive component. *Gall*, 128 S.Ct. at 597. Reasonableness is a standard of appellate review and not a matter for the district court. *Booker*, 543 U.S. 220, 261 (2005); *Gall*, 128 S. Ct. at 597; *Rita v. United States*, 127 S.Ct. 2456, 2465 (2007). Therefore, respondent's distinction of application of plain error to procedural reasonableness versus application to substantive reasonableness is one without meaning. Various appellate standards of review have component parts to their analysis, yet there is

no authority that the plain error rule requires raising either all or part of the analysis of the applicable appellate standard of review with the district court. In fact, this Court refused to apply a hybrid standard of review to sentencing appeals even under a mandatory Guidelines regime. *See Koon v. United States*, 518 U.S. 81, 100 (1996) (finding sentencing departures under mandatory Guidelines regime reviewable for abuse of discretion irrespective of whether departure decision involved a legal determination, and refusing to partially apply de novo review).

Second, the respondent ignores relevant decisions from the Third and Fourth Circuits that highlight the circuit split. In *United States v. Baham*, 215 Fed.Appx. 258, 261-262 (4th Cir. 2007), the government asserted that the procedural component of the appellate court's reasonableness review must be subjected to plain error analysis since the defendant in *Baham* had not made an after-the-fact objection to the sentence at the district court. The Fourth Circuit rejected application of plain error, and instead held that full reasonableness review was preserved for appeal when the defendant argued for a lesser sentence.

Baham, 215 Fed.Appx. at 261-262.

Likewise, the respondent fails to address the Third Circuit's decision in *United States v. Grier*, 475 F.3d 556 (3d Cir. 2007) (en banc). In *Grier*, the en banc Third Circuit, relying on the Seventh Circuit's decision in *Cunningham*, rejected application of plain error to *Booker* appellate review for procedural reasonableness. *Grier*, 475 F.3d at 571, n.11. In subsequent decision, filed after this Court's opinion in *Gall*, the Third Circuit reaffirmed its holding in *Grier*. *United States v. Watson*, 257 Fed.Appx. 556, 559 (3d Cir. 2007).

The respondent argues that the D.C. Circuit has differentiated substantive and procedural reasonableness in the application of plain error, and that it requires an objection to procedural reasonableness after pronouncement of the sentence. Brief. Opp. 9-10. The issue is not so clear; the D.C. Circuit's panel decisions conflict. In *United States v. Bras*, 483 F.3d 103 (D.C. Cir. 2007), the court held that plain error did not apply to appellate review for reasonableness since reasonableness was an appellate standard of review, "not an objection that must be raised upon

pronouncement of a sentence." *Bras*, 483 F.3d at 113. The court in *Bras* made no distinction between procedural and substantive reasonableness. However, in *In re Sealed Case*, 527 F.3d 188 (2008), with no citation or discussion of the decision in *Bras*, another panel of the D.C. Circuit held that failure to object to a district court's lack of explanation for the sentence yielded review for plain error; however, the D.C. Circuit went on to hold that a failure to provide a statement of reasons for the sentence is plain error since "[t]he absence of a statement of reasons is prejudicial in itself because it precludes appellate review of the substantive reasonableness of the sentence, thus seriously affecting the fairness, integrity, or public reputation of the judicial proceedings." *In re Sealed Case*, 527 F.3d at 193; *see also United States v. Hirliman*, 503 F.3d 212, 215 (2d Cir. 2007) (failure to provide a statement of reasons for the sentence amounts to plain error). Furthermore, the D.C. Circuit has made it clear that "[o]ne three-judge panel does not have authority to overrule another three-judge panel of the court." *LeShawn v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc).

Turning to the respondent's argument concerning the Seventh Circuit's opinion in *Cunningham*, respondent argues that no real split exists since *Cunningham* was decided prior to this Court's more recent decision in *Gall*. Brief Opp. 10-11. The Seventh Circuit's decision in *Cunningham* was decided after this Court's decision in *Booker*, upon which it relies, and the analysis in *Cunningham* is consistent with this Court's decision in *Gall*. *Cunningham*, 429 F.3d at 675, 677-680; *see also United States v. Castro-Juarez*, 425 F.3d 430, 433-434 (7th Cir. 2005). The respondent characterizes the Seventh Circuit's decision as a "cursory" analysis of the procedural reasonableness issue, Brief Opp. 11, yet a review of *Cunningham* reveals that four of the five pages of Circuit Judge Posner's published opinion concerns the procedural unreasonableness of the district court's sentence. *Cunningham*, 429 F.3d at 675-680.

Therefore, it is clear that the Third, Fourth, and Seventh Circuits have rejected plain error review to the procedural component of appellate review for reasonableness when an objection to the sentence just pronounced was not made, creating a

split with the First, Second, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits. Adding to the confusion, the D.C. Circuit's decisions internally conflict on the application of plain error to reasonableness review, and both the D.C. Circuit and the Second Circuit also have held that a district court's failure to provide sufficient reasoning for the sentence amounts to plain error.

> **In light of the strikingly different approaches adopted by the circuits, we can only hope that the Supreme Court chooses to resolve the issue of whether defendants must object after the district court has imposed a sentence to preserve some, any, or all, of their *Booker* reasonableness claims.**

Vonner, 516 F.3d at 410. Pet. App. 103.

II. REQUIRING AN OBJECTION TO THE UNREASONABLENESS OF A SENTENCE JUST PRONOUNCED IN ORDER TO PRESERVE REASONABLENESS REVIEW ON APPEAL CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT.

This Court has never required an after-the-

fact objection to preserve appellate review for reasonableness of a sentence. In both *Rita v. United States*, 127 S.Ct. 2456 (2007), and *Gall v. United States*, 128 S.Ct. 586 (2007), this Court fully reviewed the merits of procedural errors for which no procedural objections were made in the district court. A "procedural unreasonableness" objection to the sentence after it was pronounced by the district court did not occur in either case.

In *Gall v. United States*, 128 S.Ct. 586, 596 (2007), this Court elaborated on both the procedure the district court should follow when imposing a sentence and the process for appellate review. The Court in *Gall* instructed that, in sentencing appeals, the appellate court

> must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the §3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence - including an explanation for any deviation from the

Guidelines range.
Gall, 128 S.Ct. at 597. Next, "[a]ssuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under the abuse of discretion standard." *Gall*, 128 S.Ct. at 597.

In *Gall*, this Court fully addressed arguments by the government that were procedural errors, but to which the government made no objection in the district court. For example, the Court fully reviewed the government's claim that the district court based Gall's probationary sentence on the improper factor of studies concerning the relative immaturity of young offenders. 128 S.Ct. at 600-01. It also did not restrict review of the government's claim that the district court failed to consider the § 3553(a)(6) factor of unwarranted disparities, *Id.* at 598, or the district court's alleged failure to consider/account for the seriousness of the offense. *Id.* at 599.

In *Rita*, defense counsel made no district court objection to the inadequacy of the explanations or findings, yet this Court fully

reviewed the procedural issue of the sufficiency of the district court's required explanation (as well as the propriety of presuming a guideline sentence reasonable). *Rita v. United States*, 127 S.Ct. 2456 (2007).

Gall's directives demonstrate that appellate courts must review both the procedural and substantive aspects of a sentence for reasonableness. The *Gall* Court made no suggestion that reasonableness review extended only to substantive or procedural errors to which after-the-fact objections were made. Reasonableness, both procedural and substantive, is a standard of appellate review and not a matter for the district court. *United States v. Booker*, 543 U.S. 220, 261 (2005); *Gall*, 128 S.Ct. at 597; *see also United States v. Rita*, 127 S.Ct. 2456, 2465 (2007). Thus no party should argue before the district court for a reasonable sentence; the district court's mandate is to impose a sentence no greater than necessary to meet the purposes of sentencing, not to impose a reasonable sentence. 18 U.S.C. § 3553(a).

Moreover, employing plain error to limit

review of procedural reasonableness impairs the exchange of useful sentencing information between the United States Sentencing Commission and the district courts in contravention of this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). This Court established the reasonableness standard of review to replace the statutory appellate standard in 18 U.S.C. § 3742(e), which, by mandating Guidelines sentences, contributed to the Sixth Amendment error *Booker* identified in the Sentencing Reform Act. *Booker*, 543 U.S. at 259-63. *Booker* envisioned that such appellate review would promote the exchange of meaningful sentencing information Congress intended to flow between the Sentencing Commission, the district courts and the appellate courts. *Id.* at 264-65; *Rita*, 127 S.Ct. at 2469. The stream of information is limited when appellate courts use plain error review to uphold procedurally faulty sentencing decisions. A lack of a decision on the merits makes it nearly impossible for the Sentencing Commission to accurately assess the value of the statistical information it receives and considers in its ongoing process of reevaluating Guideline ranges and in attempting to limit disparity. Accordingly, application of plain error severely impairs one of the significant policy

considerations underlying appellate review for reasonableness. *Booker* at 264-65; *Rita*, 127 S. Ct. at 2469.

In support of its argument that an after-the-fact objection raising the appellate reasonableness standard of review with the district court is necessary, the respondent misinterprets a portion this Court's remedial opinion in *Booker* in which the Court instructed appellate courts to determine "whether the issue was raised below and whether it fails the 'plain-error' test." Brief Opp. 12 (quoting *Booker*, 543 U.S. at 268). After announcing the remedy to the Sixth Amendment violation presented by the then-mandatory Sentencing Guidelines, the remedial opinion in *Booker* addressed the issue of its application to cases currently within the appellate pipeline. *Booker* provided that the appellate courts were to apply both plain and harmless error, as applicable, in determining whether the Sixth Amendment error just pronounced applied "to all cases on direct review." *Booker*, 543 U.S. at 268 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)). Therefore, the quoted portion of *Booker* dealt with retroactivity to already pending cases and did not apply to

appellate review for reasonableness in post-*Booker* sentencings.

The respondent further relies on three of this Court's prior opinions unrelated to sentencing. Brief Opp. 11-13. The respondent cites to *United States v. Olano*, 507 U.S. 725, 732 (1993), in support of its argument that an after-the-fact objection for procedural unreasonableness is necessary to preserve appellate review. Brief Opp. 12. *Olano* deals with application of plain error to an issue involving the participation of alternate jurors in trial deliberation, and, in fact, *Olano* supports the petitioner's argument.

> "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right **before a tribunal having jurisdiction to determine it.**" *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 677, 88 L.Ed. 834 (1944).

United States v. Olano, 507 U.S. at 731 (emphasis added). A fundamental component of the application of plain error review – the jurisdiction

of the district court – is absent in this case. This Court's sentencing decisions in *Booker*, *Rita*, and *Gall* make it clear that reasonableness is an appellate standard of review not for district court consideration. *Booker*, 543 U.S. at 261; *Gall*, 128 S.Ct. at 597; *Rita*, 127 S.Ct. at 2465. It is nonsensical to require that a party raise the appellate standard of review with the district court in order to preserve the appellate standard of review. The district court does not have appellate jurisdiction over its own decisions, *see* 28 U.S.C. § 1291, and plain error cannot apply when an issue was not raised with a court that did not have jurisdiction to determine it. *United States v. Olano*, 507 U.S. at 731.

The respondent's reliance on *United States v. Vonn*, 535 U.S. 55, 72 (2002), is similarly misplaced. Brief in Opp. 13. *Vonn* dealt with whether harmless error review was required when a defendant did not make a district court objection to the validity of the plea. *Vonn*, 535 U.S. at 62-63. Such a situation is hardly a "comparable circumstance[]", Brief Opp. 12, to appellate review of a criminal sentence for reasonableness. *Vonn* deals with a decision by a district court over which

it had jurisdiction in the first instance – setting aside a plea. *See* Fed. R. Crim. P. 11(d)(2)(B) (district court procedure for withdrawing plea). A district court does not have appellate jurisdiction over its own decisions.

Finally, the respondent relies on *Johnson v. United States*, 520 U.S. 461, 466 (1997), in maintaining that petitioner's position would create "out of whole cloth" an exception to the plain error rule. Brief Opp. 13. *Johnson* concerns application of plain error to a district court's, as opposed to a jury's, determination of materiality in a perjury case. *Johnson* cautions against providing "any unwarranted expansion" of the plain error rule "because it would skew the Rule's careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed[.]" *Johnson*, 520 U.S. at 466 (internal citations and quotations omitted). The danger addressed by this Court in *Johnson* is certainly manifested here; the procedure advanced by the respondent would greatly expand the plain error rule. Requiring one to raise the standard of appellate review with the district in order to

preserve appellate review creates "out of whole cloth" a remarkable expansion of plain error.

CONCLUSION

For the above reasons and those articulated in his Petition, Mr. Vonner respectfully prays that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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